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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHI UNG,

Defendant and Appellant.

H044599

(Santa Clara County
Super. Ct. No. C1636671)

A jury found defendant Chi Ung guilty on two counts of first degree robbery, and he pleaded guilty to possession of a firearm by a felon. The jury also found true firearm allegations on both counts, and the trial court found Ung had served four prior prison terms. The court imposed a total prison term of seven years.

Ung raises two claims on appeal. First, he contends the trial court erroneously denied his motion to suppress evidence found in a car search. Second, he contends the court erred by limiting his cross-examination of a prosecution witness.

We conclude the first claim is meritorious but the second is not. We will reverse the judgment and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

The prosecution charged Ung with three counts: Counts 1 and 2—first degree robbery (Pen. Code, §§ 211, 212.5, subd. (a))¹; and count 3—possession of a firearm by a

¹ Subsequent undesignated statutory references are to the Penal Code.

felon (§ 29800, subd. (a)(1)). As to counts 1 and 2, the prosecution alleged Ung was armed with a firearm (§ 12022, subd. (a)(1)). The prosecution further alleged Ung had served four prior prison terms (§ 667.5, subd. (b)).

Ung pleaded guilty to count 3 and proceeded to trial on counts 1 and 2. A jury found him guilty on both counts and found true the arming allegations. The trial court found true the prior prison term allegations.

The court imposed a total term of seven years, equal to five years on count 1 with the arming enhancement, plus consecutive terms of one year four months on count 2 and eight months on count 3. The court struck the remaining prison prior terms.

B. Facts

1. Overview

Ung committed the charged offenses on two separate occasions. First, Ung and his codefendant, Thann Von, used a handgun to rob John Cochell at his home, where Cochell sold pet supplies out of his garage. Later that evening, police spotted Von in the car used for the robbery, and Von was arrested.

Four days later, police found Ung sleeping in a car parked outside a motel in San Jose. An officer opened the car door and spotted a handgun underneath Ung's left leg. Ung was identified as one of the robbers at Cochell's house.

2. The Robberies

Cochell sold aquarium supplies and other pet-related items out of the garage of his house. Among other things, he had an African grey parrot worth around \$3,000 to \$5,000.

On the afternoon of January 18, 2016, Melanie Jimenez went to Cochell's house to buy some pet supplies. She was reaching for her wallet to pay for them when two men—later identified as Ung and Von—came running into the garage. One of them had a gun. The man with the gun pointed it at Cochell, and both men demanded Cochell's bird.

Cochell said the bird wasn't there. The men then demanded money from Cochell and Jimenez. Cochell gave them \$800, and Jimenez gave them her wallet and phone.

The two men left, and Cochell followed them in his truck. Cochell followed their car for some distance and called 911 during the pursuit. Cochell described the men's appearance, and he could see the license plate number of their car. He later gave police a description of the men and their car.

Later that evening, police spotted the car parked at a motel in San Jose. They determined the car was registered to Von, who was sitting in the driver's seat. The police took him into custody and brought Jimenez and Cochell to the scene for a field show-up. Jimenez identified Von as one of the robbers, but Cochell did not recognize him. Video from a surveillance camera showed Von driving into the motel parking lot around 7:50 p.m., whereupon another man got out of the passenger's side of the car. The police compared the video of that man with a booking photo of Ung and prepared a photographic lineup including Ung's photo for Jimenez to view. Jimenez identified Ung's photo as that of one of the robbers. In court, Jimenez identified Ung as one of the robbers and testified that she was "100 percent" certain, adding, "I would stake my life on it and go to Vegas."

Amy Lam, a friend of Ung's, testified for the prosecution under a grant of immunity. Lam testified that Ung called her on the day of the robbery and asked her to pick him up at a sandwich shop. While Ung was in Lam's car, he told her he and a partner named "Blue" had robbed a house that day. Lam testified that Ung told her he got paid \$1,000 to "back up" his partner by waiting outside and watching out for him. Ung showed her a gray or silver gun that he had wrapped in a towel or a t-shirt. Lam admitted she had been convicted of grand theft in 2016 and felony commercial burglary in 2009.

3. Possession of a Handgun

Four days later, police were on patrol outside another motel in San Jose when they spotted Ung reclining in a car parked outside the motel. An officer opened the car door and spotted a handgun under Ung's left leg. The officer seized the handgun and police took Ung into custody.

II. DISCUSSION

A. Denial of the Motion to Suppress

Ung contends the trial court erred in denying his motion to suppress the fruits of the search that police conducted after finding him asleep in the car outside the motel. The Attorney General contends the search was justified under the community caretaker exception as set forth by a plurality of the California Supreme Court in *People v. Ray* (1999) 21 Cal.4th 464 (*Ray*) [plur. opn. of Brown, J.]. We decline to apply the community caretaker exception as a justification for the search, and we conclude the police violated the Fourth Amendment for the reasons below.

1. Background

Ung moved pretrial to suppress the fruits of the search under section 1538.5. The trial held a hearing at which Sergeant David Gutierrez testified as follows.

Around 9:00 a.m., Sergeant Gutierrez was on foot patrol at a motel known for criminal activity. He was checking the license plates on vehicles outside the motel to see if any were stolen. He saw a car parked in a stall for room number 8, and determined the car was registered to Lam. The vehicle was not stolen. Lam did not have any outstanding warrants and was not on probation, but she had "a history of some burglary, theft and some narcotics type of things." Another officer contacted the resident of room number 8, who told the officer the car belonged to Lam but that she was not there.

Sergeant Gutierrez approached the car and looked inside. There were five or six other officers in the vicinity at that point. Sergeant Gutierrez saw Ung in the driver's seat

with the seat back reclined and a baseball cap covering his face.² He could not see if Ung's eyes were open and did not see whether Ung's chest was moving. He saw that the door was unlocked, so he pulled the handle and opened the door to conduct a welfare check. He immediately saw the grip of a handgun under Ung's left leg. Sergeant Gutierrez grabbed the gun, took out his weapon, and ordered Ung out of the vehicle. He did not call an ambulance or administer first aid at any point.

The trial court concluded the search was reasonable under *Ray*, *supra*, 21 Cal.4th 464. The court found that the number of officers in the vicinity was explained by the fact that Sergeant Gutierrez was a training officer, and the other officers were learning how to conduct a search. The court reasoned that because Ung's face was covered, and no additional information was available to the officer at the time, it was reasonable for the police to determine whether there was any need for further services. The court found that "the circumstances are similar to *People v. Ray*," articulating the standard stated in the opinion: "... given the known facts would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community care taking functions." Accordingly, the court denied the motion to suppress.

2. Legal Principles

"The Fourth Amendment provides that '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . .' (U.S. Const., 4th Amend.) This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and thereby applies to the states. [Citations.] In reviewing a lower court's ruling, we are bound by factual findings supported by substantial evidence. [Citation.] The ultimate question of whether a search was unreasonable is a question of law we review de novo. In response to a motion to suppress evidence seized in a warrantless search, the prosecution bears the

² There was no indication that Sergeant Gutierrez was aware of Ung's involvement in the robbery at the time of the car search.

burden to prove police conducted the search under a valid exception to the Fourth Amendment's warrant requirement.” (*People v. Espino* (2016) 247 Cal.App.4th 746, 755-756.) One exception to the warrant requirement applies to a vehicle search based on probable cause. (*U.S. v. Ross* (1982) 456 U.S. 798, 809.)

3. The Search Violated the Fourth Amendment

The Attorney General concedes Ung had a reasonable expectation of privacy in the car and the officer's conduct constituted a search for Fourth Amendment purposes. But the Attorney General does not contend the officer had probable cause for the search. Rather, he argues the search was justified under the community caretaker exception set forth in *Ray*, *supra*, 21 Cal.4th 464. We are not persuaded.

In *Ray*, a plurality of the California Supreme Court opined that “circumstances short of a perceived emergency may justify a warrantless entry, including the protection of property, ‘as where the police reasonably believe that the premises have recently been or are being burglarized.’ [Citation.]” (*Ray*, *supra*, 21 Cal.4th at p. 473.) The plurality added that, “The appropriate standard under the community caretaking exception is one of reasonableness: Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?” (*Id.* at pp. 476-477.) The plurality emphasized, however, that “ ‘courts must be especially vigilant in guarding against subterfuge, that is, a false reliance upon the [personal safety or] property protection rationale when the real purpose was to seek out evidence of crime.’ [Citations.] ‘The entry cannot be made on the pretext to search for contraband or illegal activity rather than to look for [burglary] suspects and to preserve an occupant’s property. [Citation.]’ [Citation.] In this regard, the trial courts play a vital gatekeeper role, judging not only the credibility of the officers’ testimony but of their motivations. Any intention of engaging in crime-solving activities will defeat the community caretaking exception even in cases of mixed motives.” (*Id.* at p. 477.)

A plurality opinion of the California Supreme Court is not binding on this court but may be considered persuasive authority. (See *People v. Karis* (1988) 46 Cal.3d 612, 632.) The Attorney General urges us to adopt the opinion as persuasive authority, but we decline to do so. Even if we were to apply it, however, the asserted exception would not justify the search here. The plurality in *Ray* cabined the asserted exception by noting that “[a]ny intention of engaging in crime-solving activities will defeat the community caretaking exception even in cases of mixed motives.” (*Ray, supra*, 21 Cal.4th at p. 477.) Sergeant Gutierrez testified that he was present at the motel for purposes of investigating possible criminal activity, checking vehicles’ licenses plates to see if any were stolen. If he was genuinely concerned about Ung’s welfare, he could have knocked on the window of the car to determine whether Ung was unconscious or simply sleeping. The community caretaking exception as set forth in *Ray* would therefore provide no grounds to justify the officer opening the car door without probable cause.

The Attorney General further contends that, even assuming the search was unjustified, the exclusionary rule should not apply because “given the facts known to Sergeant Gutierrez and his experience and the reasonable inferences he could have drawn therefrom, it was objectively reasonable for him to believe that opening the car door to check on appellant’s welfare was lawful and necessary.” (See *Herring v. U.S.* (2009) 555 U.S. 135, 142 [when police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted in objectively reasonable reliance on the subsequently invalidated search warrant].) As Ung notes, this claim is waived because the prosecution failed to raise it below. Moreover, it was not objectively reasonable for an officer to believe it would be lawful to open the car door, as no binding legal authority would justify such a belief under these facts. (Cf. *Davis v. U.S.* (2011) 564 U.S. 229, 239 [when the police conduct a search in objectively reasonable reliance based on binding appellate precedent, the exclusionary rule does not apply].) No good faith exception applies here.

For the reasons above, we conclude the search of Ung’s car violated the Fourth Amendment, and the Attorney General fails to show the search was valid under any applicable exception. Accordingly, the trial court erred in denying Ung’s motion to exclude the fruits of the search. Furthermore, as to the conviction on count 3, the error requires reversal, as it is highly unlikely Ung would have been found guilty of possession of a firearm absent the seizure of the gun. The Attorney General therefore cannot show the error was harmless beyond a reasonable doubt as to count 3. (*Chapman v. California* (1967) 386 U.S. 18). Ung contends that exclusion of the fruits of the search also requires us to vacate the convictions on counts 1 and 2, but we do not agree. The seizure of the handgun had only modest probative value to the robbery offenses, while the remaining evidence—such as the eyewitness identifications and the video recording—was much stronger evidence of Ung’s involvement in the offense. There is no reasonable probability the jury relied on the seized evidence to find Ung guilty on counts 1 and 2.

We will reverse the judgment, vacate the conviction on count 3, and remand with instructions to grant the motion to suppress the evidence seized in the car search.

B. Limitation on Cross-Examination of Prosecution Witness

As set forth above in section I.B.2, the prosecution introduced testimony from Lam under a grant of immunity. Lam testified that Ung called her for a ride after the robbery, told her he had backed up a partner in the crime, and showed her the gun he used. Ung contends the trial court improperly limited his cross-examination of Lam by excluding any questions about the facts of a shoplifting offense she had allegedly committed. The Attorney General contends the trial court properly limited the cross-examination, but that any error was harmless even if the ruling was improper. For the reasons below, we conclude Ung suffered no prejudicial error.

1. Background

The prosecution moved pretrial to limit Ung’s questioning of Lam. Ung opposed the motion. According to the facts as proffered by Ung’s counsel, Lam had been caught

attempting to shoplift some perfume and other items at a Macy's department store. When loss prevention officers confronted her, she started to scream that they were raping her. When the police arrived, she told them the loss prevention officers had abused her, exposed part of her bra, and injured her ankle. Ung characterized this conduct as part of "a pattern of her exaggerating or fabricating details in an attempt to . . . manipulate the police."

The trial court granted the prosecution's motion. The court excluded the testimony under Evidence Code section 352, finding the probative value of the conduct low, while the danger of prejudice and undue consumption was high.

2. Legal Principles

"The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' This federal constitutional right to confront adverse witnesses in a criminal prosecution applies to the states [citation] and is also guaranteed independently by the California Constitution (Cal. Const., art. I, § 15) and by statute (§ 686). The primary reason an accused is entitled to confront adverse witnesses is to permit cross-examination. [Citations.] '[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 537-538.) However, "[r]estrictions on the right to present defense evidence are constitutionally permissible if they 'accommodate other legitimate interests in the criminal trial process' and are not 'arbitrary or disproportionate to the purposes they are designed to serve.' [Citations.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 639.)

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of

discretion under Evidence Code section 352.” (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*), citing *People v. Wheeler* (1992) 4 Cal.4th 284, 290-296.) “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) We review a trial court’s exclusion of evidence under Evidence Code section 352 for abuse of discretion. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827.)

3. Limiting Cross-Examination of Lam Was Not an Abuse of Discretion

Ung contends the trial court violated his Sixth Amendment right of confrontation and due process right to present a complete defense by excluding any evidence of Lam’s conduct during the alleged shoplifting offense. He concedes that Lam had not been convicted, and that the challenged testimony solely concerned her conduct in the matter. Relying on *Clark, supra*, he argues the trial court should have admitted it because no witness is entitled to a “false aura of veracity.” But the high court in *Clark* emphasized that such evidence is admissible subject to the trial court’s discretion under Evidence Code section 352. (*Clark, supra*, 52 Cal.4th at p. 931.)

We find no abuse of discretion. First, Lam was impeached with two prior convictions for felony commercial burglary and grand theft. Whatever additional probative value could have come from the alleged shoplifting was minimal, as her felony convictions were far more likely to diminish any “false aura of veracity.” Second, the prosecution presented abundant evidence from other sources to identify Ung, such as the testimony by Jimenez that she was “100 percent” certain he was one of the robbers. Lam’s testimony, by contrast, was comparatively weak. For example, she testified Ung told her he had waited outside during the robbery, contradicting both victims’ testimony. Even assuming the trial court had erred in excluding evidence of her shoplifting conduct, the error was harmless because it was not reasonably probable the proffered testimony

would have resulted in a more favorable outcome for Ung if it had been admitted.
(*People v. Watson* (1956) 46 Cal.2d 818, 836.)

For the reasons above, we conclude this claim is without merit.

III. DISPOSITION

The judgment is reversed, the order granting the motion to suppress is vacated, and the conviction on count 3 is vacated. On remand, the trial court shall enter a new order granting Ung's motion to suppress. If the prosecution elects not to retry Ung on count 3, the trial court shall resentence him based on the remaining verdicts and findings.

Greenwood, P.J.

WE CONCUR:

Elia, J.

Grover, J.

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